DISTRIBUTED
NOV 27 '78

Supreme Court, U. S.
FILED
NOV 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-661

ALFRED A. PORRO, JR. and THOMAS JONES,
Petitioners,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

ROGER W. BRESLIN, JR.,
Bergen County Prosecutor,
Court House,
Hackensack, New Jersey 07601.
(201) 646-2300

JAMES MAYER,
Assistant Prosecutor,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

PAGE

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED:

Point I—Students do not make up a constitutionally cognizable class 2

Point II—There is no division of opinion among state courts on the constitutional cognizability of students 6

Point III—The exclusion of students has ceased in Bergen County, rendering the question moot 9

CONCLUSION 9

Cases Cited

Anderson v. Cassels, 531 F.2d 685 (2nd Cir. 1976) 4, 8

Apodaca v. Oregon, 406 U.S. 404 (1972) 3

Brown v. State, 58 Wis. 2d 158, 205 N.W. 2d 566 (Sup. Ct. 1973) 7-9

Carter v. Jury Commission, 396 U.S. 320 (1970) 2, 3

Cobbs v. Robinson, 528 F.2d 1331 (2nd Cir. 1975), cert. denied 424 U.S. 947 (1976) 4

Government of the Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974) 3

Paciona v. Marshall, 45 App. Div. 2d 462, 359 N.Y.S. 2d 360 (App. Div. 1974) 6-8

People v. Attica Brothers, 79 Misc. 2d 492, 359 N.Y.S. 2d 699 (Sup. Ct. 1974) 6, 7

PAGE

People v. Marr, 67 Misc. 2d 13, 324 N.Y.S. 2d 608 (Justice Ct. 1971) 6

Peters v. Kiff, 407 U.S. 493 (1972) 2, 3

Rawlins v. Georgia, 201 U.S. 899 (1906) 2

Smith v. Texas, 311 U.S. 128 (1940) 2

State v. Butler, 155 N. J. Super. 270 (App. Div. 1978) 6

State v. Porro, 158 N. J. Super. 269 (App. Div. 1978) 6

Taylor v. Louisiana, 419 U.S. 522 (1975) 2, 3

Thiel v. Southern Pacific Co., 328 U.S. 217 (1945) 2, 3, 6

United States v. Butera, 420 F.2d 564 (1st Cir. 1970) 3

United States v. Guzman, 377 F.Supp. 140 (S.D.N.Y. 1972), affirmed 468 F.2d 1245 (2nd Cir. 1972), cert. denied 410 U.S. 937 (1973) 4, 7

United States Constitution Cited

Fourteenth Amendment 2

Statute Cited

N.J.S.A. 2A:69-2 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-661

ALFRED A. PORRO, JR. and THOMAS JONES,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

POINT I

Students do not make up a constitutionally cognizable class.

Historically, the Supreme Court has been concerned with the exclusion of classes based upon race, sex, or economic status. *Carter* v. *Jury Commission* 396 U.S. 320 (1970), (exclusion of blacks); *Taylor* v. *Louisiana,* 419 U.S. 522 (1975), (exclusion of women); *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1945), (exclusion of daily wage earners). Exclusion based on race has perhaps been the most frequent because it is clearly in violation of the 14th Amendment, but also because it is patently offensive. *Peters* v. *Kiff,* 407 U.S. 493 (1972); *Smith* v. *Texas,* 311 U.S. 128 (1940).

But the federal courts have recognized that the mere exclusion of a particular group or category of persons does not necessarily violate the constitution or result in an inherently unrepresentative sample of the population. States have been free to exempt various occupations from jury service. In *Rawlins* v. *Georgia,* 201 U.S. 899 (1906) this court confronted the jury exclusion problem in Lowndes County, Georgia, where many occupations such as lawyers, preachers, doctors and farmers were excluded from jury service. Writing for the Court, Justice Holmes noted:

> "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. *The exclusion was not the result of race or class prejudice.* 201 U.S. at 900. (emphasis added)

The last sentence sums up the type of discrimination which truly concerns the Courts, with perhaps the addition of discrimination based on sex. Exclusions based on age was the subject of several cases but individual age brackets failed to qualify, except when the exclusion of broad categories may be indicative of an inherently discriminatory selection process. *United States* v. *Butera,* 420 F.2d 564 (1st Cir. 1970).

That certain occupational classes may be excluded from jury service is still a well-recognized principle. In *Government of the Canal Zone* v. *Scott,* 502 F.2d 566 (5th Cir. 1974), the Court held that the exclusion of military personnel from jury duty did not violate defendant's constitutional right to an impartial jury. Citing *Rawlins, supra,* the court stated certain occupations may be excluded categorically on the *bona fide* basis that it is for the good of the community that their regular work should not be interrupted. New Jersey recognizes twelve such exceptions in N.J.S.A. 2A:69-2.

In *Peters* v. *Kiff, supra,* the Supreme Court noted the continuing vitality of this standard as a qualification on the "fair cross section" principle. States are given broad discretion in this area. So long as such exemptions of persons by class or occupation are determined rationally and not by prejudice, they are not constitutionally infirm. This, so long as the process is reasonably calculated to produce a fair and impartial jury. *Taylor* v. *Louisiana, supra; Carter* v. *Jury Commission, supra; Thiel* v. *Southern Pacific Co., supra.* A mirror image of the community or proportional representation is not required. *Taylor* v. *Louisiana, supra; Apodaca* v. *Oregon,* 406 U.S. 404 (1972).

Although the jury commissioners of Bergen County acted beyond their statutory authority by excluding students from the master jury list, it cannot be said that this

action destroyed the representative quality of the grand or petit juries in Bergen County. Additionally, this procedural defect alone is not a federal constitutional error unless it can be shown that the group or class excluded is cognizable in the constitutional sense. *Anderson* v. *Casscles,* 531 F.2d 685 (2nd Cir. 1976); *Cobbs* v. *Robinson,* 528 F.2d 1331 (2nd Cir. 1975), cert. denied 424 U.S. 947 (1976).

Clearly a person's identity as a student cannot be nearly as important as his or her race, sex or even identity as a member of a particular economic class. In fact, students come from *all* races, sexes and economic classes, more so today than ever before in history. While petitioners may argue that students as a group possess a statistical significance, this does not rise to constitutional significance, or cognizability.

Students also fail as a cognizable group when examined under the often cited test set out in *United States* v. *Guzman,* 377 F.Supp. 140 (S.D.N.Y. 1972) affirmed 468 F.2d 1245 (2nd Cir. 1972), cert. denied 410 U.S. 937 (1973). Briefly, to qualify under the *Guzman* test a group must have 1) a definite composition, 2) cohesion, and 3) community of interest. As to this first, the *Guzman* court noted that,

> "[a] cognizable group is not one whose membership shifts from day to day or whose members can be aribitrarily selected."

Clearly there must be some permanence to such a group, such as race or sex. Considering the average four year college term, each year approximately one fourth of the students graduate as seniors and are replaced by freshmen. Besides this substantial annual turnover, students are regularly dropping out and registering anew in mid

year. Such constant change of membership is the antithesis of constitutional cognizability.

The second and third parts are quite similar, if not identical. Merely because students are shown statistically to share many common views does not make that group constitutionally cognizable. The characteristics making up cognizability are infinitely more pervasive than statistical responses to particular questions. One would be hard-pressed to say that generally all whites or all blacks, or all men and all women, share a particular attitude or would vote in a particular way on any given case. Indeed, even if it could be shown that the membership of any one of these groups were evenly divided on all issues, these groups would nevertheless retain their status as cognizable. Statistically measured responses, then, are clearly not the test, since such data would be irrelevant in cases of race, sex or economic class discrimination.

What distinguishes these latter groups is the fact that people fall into such categories generally by means or forces beyond their control. Clearly our system of government could not justify or tolerate discrimination on such a basis. There could be no reasonable basis therefor. But students join, and generally leave, the group by choice. Like the generally recognized statutory exemptions, there is nothing inherently offenseive about excluding such a group. Indeed, the rationale for excluding students in Bergen County, the reluctance to disturb the educational process, has a reasonable basis.

Thus, students as a group do not comprise a constitutionally cognizable class.

POINT II

There is no division of opinion among state courts on the constitutional cognizability of students.

The appearance of division among the lower state courts on the issue of constitutional cognizability of students is illusory and disappears upon careful scrutiny. The intermediate appellate courts of New Jersey have held that students are not such a group that meets the standards of cognizability. *State* v. *Butler,* 155 N. J. Super. 270 (App. Div. 1978); *State* v. *Porro,* 158 N. J. Super. 269 (App. Div. 1978) (the present case).

Two cases dealing with the exclusion of students have been decided in New York, both by trial courts. In *People* v. *Marr,* 67 Misc. 2d 13, 324 N.Y.S. 2d 608 (Justice Ct. 1971) the defendant challenged the jury selection system prior to trial. Relying on *Thiel,* the trial judge held that the systematic exclusion of students was improper and ordered a new jury selected. In characterizing students as a "class," the court set forth no discussion as to cognizability.

Then, in *People* v. *Attica Brothers,* 79 Misc. 2d 492, 359 N.Y.S. 2d 699 (Sup. Ct. 1974), another trial court found the systematic exclusion of students to be impermissible, also relying on *Thiel,* and again with no discussion of cognizability in the constitutional sense. There, however, the panel was not struck, the court noting recent changes in the selection process as obviating that necessity.

Shortly after *Attica* came the decision of *Paciona* v. *Marshall,* 45 App. Div. 2d 462, 359 N.Y.S. 2d 360 (App. Div. 1974), which is ambiguous at best. Defendant there challenged the grand jury because of exclusion of women and students. The court noted the findings of *Attica,* the

same jury pool apparently being involved. However, the court dismissed the challenge as untimely, never reaching the merits. But the court did say this:

> "The record clearly supports a finding that the composition of the Grand Jury resulted in no prejudice to the petitioner . . ." 35: N.Y.S. 2d at 363.

One may infer from this that the court was not in total sympathy with the conclusion reached in *Attica.*

It would be a mistake to attribute to these cases the significance that petitioners would. Although both noted that systematic exclusion of students was impermissible, there is no indication that this was meant in the constitutional sense. It was actually more in the nature of a policy consideration, the court thereby preventing the potential violation of defendant's rights. Neither case ventured any discussion of whether students as a class met the requirements of cognizability, and *Attica* never even mentioned the *Guzman* standard, notwithstanding that it had been decided three years earlier.

The only case which comes close to the present one is *Brown* v. *State,* 58 Wis. 2d 158, 205 N.W. 2d 566 (Sup. Ct. 1973), where defendant challenged the petit jury that convicted him. There the court found that the systematic exclusion of students was primarily a result of the lowering of the age of jury eligibility from 21 to 18. Although there was no statutory authority for the exclusion of students, the court sanctioned the practice in the past because most students were generally under 21. Therefore, the conviction was affirmed notwithstanding this unauthorized, systematic exclusion of students giving prospective effect only to the mandate that students must no longer be excluded.

Thus, there appears to be no real conflict between *Brown* and the instant case, both counts having found that, although the exclusion was unauthorized, there was nevertheless a reasonable basis therefor. As in the New York cases, *Brown* never went into the cognizability standards.

Implicit in both the *Paciona* and *Brown* decisions is the fact that neither considered students a cognizable class constitutionally. Had either been dealing with the systematic exclusion of blacks or women, the result would obviously have been different. It may fairly be said that all four cases stand for the proposition that students should not be excluded from jury service, but that such exclusion does not rise to constitutional proportions.

One federal case, *Anderson* v. *Casscles, supra,* touched upon the exclusion of students. However, there was an insufficient record before the court so no decision was reached.

Thus it would appear that state courts are in substantial agreement that students should not, as a matter of policy, be systematically excluded from jury service. Only New Jersey has actually reached the question of constitutional cognizability. In the absence of any real conflict or confusion on this issue there exists no compelling reason for this Court to act.

POINT III

The exclusion of students has ceased in Bergen County, rendering the question moot.

What is so important about the *Brown* decision is that the court found that students were systematically excluded from a petit jury which actually convicted the defendant. In spite of this, the court did not disturb the conviction, probably because it considered the exclusion of students a violation of policy rather than a violation of the defendant's constitutional rights. Obviously, had blacks or women been excluded the conviction would have been reversed. Under the circumstances the court made its mandate prospective only.

Essentially the same result has been reached by the court below. The court noted that it was preferable to call students as jurors but took no action since the exclusionary practice had ceased. As in *Brown,* the exclusion did not reach constitutional proportions.

Since the practice has been terminated, the question before the Court is moot rendering a ruling unnecessary.

CONCLUSION

There is no substantial federal constitutional question and the Writ of Certiorari should not be granted.

Respectfully submitted,

ROGER W. BRESLIN, JR.,
Bergen County Prosecutor.

JAMES MAYER,
Assistant Prosecutor,
On the Brief.